

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135 and U-4314, and related entities (collectively "Cingular") to determine whether Cingular has violated the laws, rules and regulations of this State in its sale of cellular telephone equipment and service and its collection of an Early Termination Fee and other penalties from consumers.

Investigation 02-06-003
(Filed June 6, 2002)

**ADMINISTRATIVE LAW JUDGE'S RULING
RESOLVING SEPTEMBER 25, 2002 MOTION TO COMPEL DISCOVERY**

By motion filed on September 25, 2002, the Commission's Consumer Protection and Safety Division (CPSD) and Utility Consumers' Action Network (UCAN) jointly ask for reconsideration of portions of my August 8 discovery ruling. A concurrent motion, which will be addressed separately, requests leave to file under seal the declarations included in support of the motion for reconsideration. Cingular Wireless (Cingular) filed a response to the motion for reconsideration on September 26, 2002. The motion is granted to the extent provided herein.

Discussion

UCAN and CPSD seek reconsideration of two issues resolved in the August 8 ruling¹ and referred to in that ruling as the “California Question/Corporate Decision Memos” and the “Voicestream [sic] Agreement.” Cingular’s opposition, filed in response to my e-mail notification to the parties on September 25 that any response should be filed by September 26 if the parties wished me to consider it, argues that UCAN and CPSD have not shown good cause for reconsideration.

Rule 45(f) of the Commission’s Rules of Practice and Procedure permits an administrative law judge (ALJ) to set the date for responses to motions other than the usual 15-day period; Rule 45(h) permits an ALJ to rule on a motion before responses or replies are filed. Under the current schedule, CPSD and UCAN are to distribute prepared testimony on October 9. Their September 16 joint motion to defer this date to October 23 and, pursuant to Pub. Util. Code § 1701.2(d), for a Commission-ordered extension of the 12-month deadline for resolution of this case, is pending. Considering the implications for the schedule under either timeline scenario, prompt resolution of this motion is warranted. It is unnecessary to address at length Cingular’s argument that CPSD and UCAN could have--and therefore, should have--brought this motion earlier, since the delay primarily affects the moving parties’ case preparation, and not Cingular’s.

¹ The ruling is entitled *Administrative Law Judge’s Ruling Granting Request of Telephia, Inc. to Intervene and Resolving July 29, 2002 Motion to Compel Discovery*.

California Question/Corporate Decision Memos. With respect to this issue, the August 8 ruling provides:

Cingular shall respond to DRs 4, 7, 8, 12, 16, 17, and 48 by providing all documents prepared in California or provided to Cingular's California management. Considering the burden a national search of documents would entail, Cingular need not perform such a search at this time. Upon receipt and review of responsive documents, CPSD may renew its request for broader discovery and if it does so, shall state its reasons for the renewal. (August 8 Ruling at pp.3-4.)

The declarations of Christopher Witteman (Witteman), counsel for CPSD and Lee Biddle (Biddle), counsel for UCAN, state in essence, that discovery to date, including deposition testimony, strongly suggests that documents reflecting corporate decisions affecting California have not been "prepared in California or provided to Cingular's California management" but rather, have been retained within the files of certain employees at Cingular's Atlanta, Georgia headquarters. CPSD and UCAN have established good cause for reconsideration.

CPSD and UCAN seek to compel discovery in response to CPSD's Data Requests (DRs) 16 (internal memoranda re: the marketing of Cingular's services in California), 17 (internal memoranda re: corporate decisions about cellular coverage, system capacity, antenna siting, antenna acquisition), 23 (Cingular's return policies) and 47 (data/documents re: consumer complaints).² More specifically, CPSD and UCAN seek:

² DRs 23 and 47 are not addressed in the August 8 ruling because they were not the subjects of the underlying motion to compel discovery. However, they appear to have been put at issue in the context of the broader discovery sought by the instant motion.

Cingular's production of minutes of meetings at which national corporate policy was conveyed to the Regions (including California), as well as Cingular's production of documents responsive to CPSD's document request as found within the files or offices of seven Atlanta national personnel, as designated by CPSD/UCAN... (Motion at p.2 ("Proposed Relief")).³

CPSD and UCAN posit that the since their discovery request has become more focused and they now "are willing to limit the discovery of Cingular Atlanta to specified documents (e.g., minutes of meetings where the Western Region received direction from Atlanta management) ..." and to the files of a reduced number of management personnel, the alleged burden of production should no longer limit their access. (Motion at p. 7.) Nonetheless, Cingular predicts it will need to "at least two weeks to review and produce the additional materials..." (Response at p. 2.)

After considering the parties' pleadings, I will grant the CPSD/UCAN motion for reconsideration, and direct Cingular to response to CPSD's DRs 16, 17, 23 and 47, as follows: Cingular shall produce, as speedily as possible, minutes of meetings at which national corporate policy was conveyed to California or the Western Region and shall produce other responsive documents in the files of Messrs. Carter, Reynolds, Shaner and Feidler. CPSD/UCAN and Cingular shall meet and confer to discuss the identity of, and the need for discovery from, a limited number of other corporate management officials,

³ Elsewhere, CPSD and UCAN state that they seek the "...the files of 5-10 specified management persons." (Motion at p. 7.) The motion does not list the individuals CPSD and UCAN have in mind though it suggests that the most important employees are the following four: Stephen Carter, the president and CEO and "national network manager Ed Reynolds, national marketing manager Bob Shaner, and national operations manager Mr. Feidler." (Motion, at footnote 14.)

consistent with the representations in the CPSD/UCAN motion. Additional, closely focused discovery of such officials is authorized under this ruling.

VoiceStream Agreement. The August 8 ruling provides:

Cingular need not produce its June 2002 agreement with Voicestream. Counsel for Cingular represent that the agreement post-dates the issuance of this investigation. Therefore, the relevance of the agreement to this proceeding appears to be marginal, at best. (August 8 Ruling at p. 4.)

The CPSD/UCAN motion, supported by the Witteman and Biddle declarations, states that discovery to date indicates that Cingular and VoiceStream entered into an agreement in principal some seven or eight months before this investigation issued and that “this agreement influenced network improvement plans at that time.” (Motion at p. 3.) Accordingly, CPSD and UCAN argue that the VoiceStream Agreement is relevant to the charge that Cingular misrepresented the terms and conditions of its service to consumers (e.g., the “past behavior” discussed in the Order Instituting Investigation (OII) at p. 13, mimeo.) Cingular does not convincingly controvert the relevancy, from the standpoint of discovery, of this potential linkage.

Rather, Cingular points to the various risks to the schedule for this proceeding and to its integrity, if every ALJ ruling should become the subject of a motion for reconsideration. Though discovery in the proceeding has proven inordinately contentious, *going forward I expect both parties to exercise prudence before filing any discovery motions and particularly, before filing any motion that seeks reconsideration of a previous discovery ruling.*

With that understanding, I will grant the CPSD/UCAN request for reconsideration and direct Cingular to produce the VoiceStream agreement. CPSD and UCAN may pursue related, focused discovery. Though VoiceStream

is not a party to this proceeding, it is an entity subject to the regulatory jurisdiction of this Commission. To the extent information in the agreement or related discovery contains the kind of confidential information the Commission protects under Pub. Util. Code § 583 and General Order 66-C, VoiceStream and Cingular may claim that protection and may require that any disclosure to UCAN be subject to a nondisclosure agreement executed by the pertinent parties.

Import of Prior VoiceStream Ruling. CPSD and UCAN assert that the August 8 ruling “has been taken as a general adjudication that the relevant time for purposes of this Investigation ends on the June 6, 2002, date on which the above referenced Investigation was instituted by the Commission.” (Motion at p. 3.) This is an overbroad reading of the August 8 ruling, which, based on the representations of the parties at that time, adjudicated the narrow issue of whether the VoiceStream agreement should be produced—and nothing more.

Permissible discovery is that “reasonably calculated to produce admissible evidence or the discovery of admissible evidence.” (*Davis v. Sup. Ct.* (1984) 36 C.3d 291.) From an evidentiary standpoint, the relevancy of documents that post-date June 6, 2002, or testimony about any period after issuance of the investigation, depends on whether the documents or testimony tend to prove or disprove the charges alleged. (See Evid. Code § 210.) The OII states that the charges alleged therein “arise from past behavior.” (OII, at 13, mimeo.)

IT IS RULED that:

1. The joint September 25, 2002, motion of the Commission’s Consumer Protection and Safety Division (CPSD) and Utility Consumers’ Action Network (UCAN) for consideration of the August 8, 2002, *Administrative Law Judge’s Ruling Granting Request of Telephia, Inc. to Intervene and Resolving July 29, 2002 Motion to Compel Discover* (August 8 Ruling), is granted as provided below.

- (a) Cingular Wireless (Cingular) shall respond to CPSD's Data Requests 16, 17, 23 and 47, as follows: Cingular shall produce, as speedily as possible, minutes of meetings at which national corporate policy was conveyed to California or the Western Region and shall produce other responsive documents in the files of Messrs. Carter, Reynolds, Shaner and Feidler.
- (b) CPSD/UCAN and Cingular shall meet and confer to discuss the identity of, and the need for discovery from, a limited number of other corporate management officials, consistent with the representations in the CPSD/UCAN motion. Additional, closely focused discovery of such officials is authorized under this ruling
- (c) Cingular shall produce the agreement executed with VoiceStream in June 2002, and in addition, CPSD and UCAN may pursue related, focused discovery of the business arrangement between Cingular and VoiceStream. To the extent information in the agreement or related discovery contains the kind of confidential information the Commission protects under Pub. Util. Code § 583 and General Order 66-C, VoiceStream and Cingular may claim that protection and may require that any disclosure to UCAN be subject to a nondisclosure agreement executed by the pertinent parties.

2. The August 8 Ruling, based on the representations of the parties at that time, adjudicated the narrow issue of whether the VoiceStream agreement should be produced.

3. The joint September 25, 2002, motion of CPSD and UCAN to submit under seal the declarations supporting their motion for reconsideration of the August 8 Ruling will be addressed separately.

Dated September 30, 2002, at San Francisco, California.

/s/ JEAN VIETH

Jean Vieth

Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Resolving September 25, 2002 Motion to Compel Discovery on all parties of record in this proceeding or their attorneys of record.

Dated September 30, 2002, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.